A

## CHASE PERDANA BHD

**v.**

## MD AFENDI HAMDAN

B

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
ALLAUDIN MOHD SHERIFF PCA
JAMES FOONG FCJ
[CIVIL APPEAL NO: 02 (F)-12-2009 (S)]

C

15 SEPTEMBER 2009

***SECURITIES:*** *Shares - Sale and purchase - Claim for refund of deposit after approvals from authorities could not be obtained - Whether purchase was subject to approvals being obtained - Whether a requirement*

D *of law that could not be waived - Securities Industry Act 1983, s. 12*

The appellant agreed to purchase RM5 million of the respondent's shares in a company called Jernih Karya Sdn Bhd ('Jernih Karya') *via* a Letter of Undertaking. The undertaking was subject to

E approvals being obtained from the Ministry of Finance ('MOF') and the Foreign Investment Committee ('FIC'). The appellant paid a deposit of RM1 million. The appellant also entered a sale and purchase agreement ('SPA') with one Madrigal Gumba, the one other shareholder of Jernih Karya, to purchase the balance of the

F shares therein. The said approvals could not be secured and the shares in Jernih Karya were rendered worthless. The appellant then claimed for the refund of the deposit but the respondent refused the claim. The appellant then brought an action against the respondent in the High Court. The High Court dismissed the

G appellant's claim but allowed the respondent's counterclaim ordering the appellant to pay the remaining RM4 million as agreed between the parties. The High Court found that there was an oral agreement between the parties that varied the terms in the Letter of Undertaking. On appeal, the Court of Appeal held that the

H parties had agreed to waive the conditions set by the MOF and FIC by virtue of the oral agreement. The appeal was dismissed. The appellant now appealed before the Federal Court.

**Held (allowing the appeal)**
**Per Zaki Tun Azmi CJ delivering judgment of the court:**

I

**(1)** The Letter of Undertaking and the SPA expressly stipulated that the said approvals must be obtained. As the said approvals were not obtained, the appellant rightly submitted

that the Letter of Undertaking could not be enforced, unless, as held by the Court of Appeal, those requirements could be waived. However, the Court of Appeal had erred in that conclusion. Parties to an agreement could not waive statutory requirements. The MOF's approval was required under the Securities Industries Act 1983 (then in force) and the 1987 Regulations. The FIC's approval was only a policy of the government and not backed by any written law. (paras 16 & 17)

**(2)** Once it is enacted by legislation that parties are required to comply with a provision, such compliance was mandatory. It is not for any person to waive legislative requirements by an agreement unless the legislation allows that to be done. Legislation enacts laws for the public's benefit. It is not for the courts or anybody else to state that it need not be followed. (para 18)

**(3)** The fulfillment of a condition precedent in a contract of sale is binding upon parties (See *Aberfoyle Plantations Ltd v. Khaw Bian Cheng; Waman Shriniwas Kini v. Ratilal Bhagwandas and Co; Dhanukdhari Singh & Anor v. Nathima Sahu & Ors*). It was the intention of the parties that the said approvals must be obtained – a condition precedent in the contract that must be fulfilled. That requirement was further confirmed in the respondent's letter dated 28 June 1997 enclosing the payment of the RM1 million deposit. (paras 19 & 20)

**(4)** The responsibility for obtaining the said approvals could not be said to lie with the appellant and Madrigal Gumba. The Letter of Undertaking and the letter enclosing the deposit payment clearly spelt out that the respondent agreed to refund the deposit in the event the approvals were not obtained. It did not matter whose duty it was to obtain the approval. The fact remained that statutory approval was not secured. It would have been otherwise if, a condition precedent, not required by law. (para 21)

**(5)** The MOF's approval was a requirement under s. 12 of the Securities Industry Act 1983. The present appeal could be disposed off by only looking into that requirement issue. (para 22)

**(6)** There was no reason to disturb the learned judge's finding of the existence of an oral agreement as he had the benefit of observing the demeanour of the witnesses. The oral agreement entered between the appellant and the respondent was recognised in law by virtue of ss. 91 and 92 of Evidence Act 1950. However, the oral agreement contradicted the terms in the Letter of Undertaking and the SPA. It was not a term that the original document was silent about. The Letter of Undertaking and the SPA required that the said approvals be obtained whilst the oral agreement waived that requirement. Therefore, the exception in proviso (b) s. 92 of Evidence Act 1950 could not apply and the terms in the Letter of Undertaking continue to be applicable. That apart, the Letter of Undertaking was not independent of the SPA as it was expressly referred to therein. (paras 25, 26, 27, 28 & 29)

***Bahasa Malaysia*** *Translation Of Headnotes*

Melalui suatu Surat Akujanji, perayu bersetuju untuk membeli saham-saham responden bernilai RM5 juta di dalam syarikat yang dipanggil Jernih Karya Sdn Bhd ('Jernih Karya'). Akujanji adalah tertakluk kepada kebenaran diperolehi dari Kementerian Kewangan ('MOF') dan Jawatankuasa Pelaburan Asing ('FIC'). Perayu telah membayar deposit sebanyak RM1 juta. Perayu juga telah memeterai perjanjian jual beli ('SPA') dengan Madrigal Gumba, satu-satunya pemegang saham lain Jernih Karya, bagi membeli saham-saham selebihnya. Kebenaran bagaimanapun gagal diperolehi dan saham-saham Jernih Karya telah menjadi tidak bernilai. Berikutnya perayu menuntut pengembalian deposit tetapi ditolak oleh responden. Perayu kemudian memulakan guaman terhadap responden di Mahkamah Tinggi. Mahkamah Tinggi menolak tuntutan perayu tetapi membenarkan tuntutan balas responden dan sekaligus memerintahkan perayu membayar baki RM4 juta seperti yang dipersetujui pihak-pihak. Mahkamah Tinggi mendapati bahawa terdapat satu perjanjian lisan di antara pihak-pihak yang mengubah terma-terma Surat Akujanji. Di rayuan, Mahkamah Rayuan memutuskan bahawa pihak-pihak, melalui perjanjian lisan tersebut, telah bersetuju untuk mengorbankan syarat-syarat yang ditetapkan oleh MOF dan FIC, dan dengan itu menolak rayuan. Perayu kini merayu ke Mahkamah Persekutuan.

**Diputuskan (membenarkan rayuan)**
**Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:**

**(1)** Surat Akujanji dan SPA secara ekspres menyatakan bahawa kebenaran-kebenaran hendaklah diperolehi. Oleh kerana kebenaran-kebenaran tidak diperolehi, maka perayu betul apabila berhujah bahawa Surat Akujanji tidak boleh dikuatkuasakan, kecuali, sepertimana yang diputuskan oleh Mahkamah Rayuan, syarat-syarat tersebut boleh dikorbankan. Mahkamah Rayuan bagaimana pun khilaf dalam rumusannya itu. Pihak-pihak kepada perjanjian tidak boleh mengorbankan syarat-syarat statutori. Kebenaran MOF adalah dituntut di bawah Akta Perindustrian Sekuriti 1983 (berkuatkuasa waktu itu) dan Peraturan-Peraturan 1987. Kebenaran FIC hanyalah pula satu dasar kerajaan dan tidak disokong oleh mana-mana undang-undang.

**(2)** Sebaik sahaja ianya digubal oleh undang-undang bahawa pihak-pihak dikehendaki mematuhi sesuatu peruntukan, maka pematuhan adalah mandatori. Tiada siapa pun boleh mengorbankan kehendak perundangan melalui perjanjian kecuali jika itu memang dibenarkan oleh perundangan. Perundangan menggubal undang-undang untuk manfaat awam. Mahkamah atau siapa jua pun tidak boleh berkata bahawa ia tidak perlu diikuti.

**(3)** Memenuhi syarat duluan sesuatu perjanjian jual beli adalah satu perkara yang mengikat pihak-pihak (lihat *Aberfoyle Plantations Ltd v. Khaw Bian Cheng; Waman Shriniwas Kini v. Ratilal Bhagwandas and Co; Dhanukdhari Singh & Anor v. Nathima Sahu & Ors*). Menjadi niat pihak-pihak bahawa kebenaran-kebenaran hendaklah diperolehi – sebagai syarat duluan di dalam kontrak yang mesti dipenuhi. Syarat tersebut disahkan seterusnya di dalam surat responden bertarikh 28 Jun 1997 yang mengemukakan bayaran deposit sebanyak RM1 juta.

**(4)** Tanggungjawab untuk mendapatkan kebenaran-kebenran tersebut tidak boleh dikata sebagai terletak ke atas perayu dan Madrigal Gumba. Surat Akujanji dan surat yang mengemukakan bayaran deposit jelas menyatakan bahawa responden bersetuju untuk mengembalikan deposit jika kebenaran gagal diperolehi. Faktanya masih lagi bahawa kebenaran sedemikian tidak diperolehi. Keadaannya mungkin berbeza jika syarat duluan ini bukan suatu keperluan undang-undang.

**(5)** Kebenaran MOF adalah suatu keperluan di bawah s. 12 Akta Perindustrian Sekuriti 1983. Rayuan semasa boleh dilupuskan hanya dengan melihat kepada isu syarat ini sahaja.

**(6)** Tiada alasan untuk mengganggui dapatan yang arif hakim mengenai kewujudan perjanjian lisan kerana beliau mempunyai manfaat memerhatikan tingkah laku saksi-saksi. Perjanjian lisan yang dimeterai perayu dan responden juga diiktiraf oleh undang-undang berdasarkan ss. 91 dan 92 Akta Keterangan 1950. Bagaimanapun, perjanjian lisan telah menyanggahi terma-terma Surat Akujanji dan SPA. Ia bukanlah terma di mana perjanjian asal tidak menyebut apa-apa mengenainya. Surat Akujanji dan SPA mengkehendaki bahawa kebenaran-kebenaran tersebut hendaklah diperolehi sementara perjanjian lisan tidak memerlukan syarat tersebut. Oleh itu, proviso (b) s. 92 Akta Keterangan 1950 tidak boleh dipakai dan terma-terma di dalam Surat Akujanji menjadi terus terpakai. Selain itu, Surat Akujanji juga bukannya bebas dari SPA memandangkan ia disebut di dalamnya dengan secara ekspres.

**Case(s) referred to:**

*Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1960] 26 MLJ 47* ***(refd)***

*Dhanukdhari Singh & Anor v. Nathima Sahu & Ors XI CWN 848* ***(refd)***

*Surajmull Nargoremull v. Triton Insurance Company Limited [1924] 52 IA 126* ***(refd)***

*Waman Shriniwas Kini v. Ratilal Bhagwandas and Co AIR [1959] SC 689* ***(refd)***

**Legislation referred to:**

Evidence Act 1950, ss. 91, 92(a), (b), (c), (d), (e), (f)

Securities Industries Act 1983, s. 12

*For the appellant - Dato' Dr Cyrus Das (Francis Wong with him); M/s William Liaw, Chan & Lo*

*For the respondent - Dato' Cecil Abraham (Jeyan Marimuttu & Partners with him); M/s J Marimuttu & Partners*

*Reported by Usha Thiagarajah*

## JUDGMENT

### Zaki Tun Azmi CJ:

**[1]** The dispute in this appeal is whether the respondent is obliged to refund RM1 million paid as a deposit to the respondent by the appellant for the purchase of all RM5 million worth of respondent's shares in Jernih Karya Sdn Bhd ("Jernih Karya")

pursuant to a Letter of Undertaking dated 24 June 1997 ("Letter of Undertaking") with certain conditions as will be explained later. If the answer is in the negative, the appellant will then have to pay the balance of RM4 million to the respondent, since RM1 million had been previously paid.

**[2]** Sometime around June 1997, the Ministry of Finance ("MOF") approved the establishment of a securities broking firm known as First Securitites Sdn Bhd ("First Securities") pursuant to s. 12 of the then Securities Industries Act 1983[1]. First Securities shall be a holder of a dealer's licence to carry on business as a securities broking firm and it shall be wholly owned by Dioncorp Sdn Bhd. Dioncorp Sdn Bhd in due course shall apply to be a member company of the then Kuala Lumpur Stock Exchange (now known as Bursa Malaysia).

**[3]** With the approval of the MOF, Yayasan Bumiputra Sabah held 51% of the equity in Dioncorp Sdn Bhd and Jernih Karya, a private limited company, holds the other 49% of the equity. The respondent together with another person by the name of Madrigal Gumba, are the shareholders of Jernih Karya. The respondent held 240 paid up shares in Jernih Karya.

**[4]** The appellant, a public listed company in the then Kuala Lumpur Stock Exchange, wanted to gain control over First Securities. The appellant appointed Madrigal Gumba to purchase the 240 shares held by the respondent in Jernih Karya. With such transfer of shares, Madrigal Gumba's shareholding in Jernih Karya would increase to 900 shares. The appellant will then purchase all 900 shares held by Madrigal Gumba in Jernih Karya for the sum of RM22 million. Through this scheme, the appellant will control Jernih Karya. Indirectly through Jernih Karya, the appellant will have 49% of the equity in Dioncorp Sdn Bhd, the company that wholly owns First Securities. This would enable the appellant to be in control of First Securities.

**[5]** A Letter of Undertaking was given by the appellant to the respondent to transfer the 240 shares to Madrigal Gumba in consideration that the appellant pays the respondent a sum of RM5 million. That undertaking to transfer the respondent's 240 shares to the appellant was subject to the two following conditions contained in the letter of undertaking:

i. A deposit of Ringgit Malaysia One Million (RM1,000,000.00) only upon execution and stamping of the following documents:

(a) Sale and Purchase Agreement between Madrigal B Gumba and Chase Perdana Berhad in respect of the purchase by the latter of a certain number of shares in Jernih Karya Sdn Bhd.

(b) Execution of the Shareholders Agreement between Yayasan Bumiputra Sabah and Chase Perdana Berhad in respect of the Joint Venture Investment Company known as Dioncorp Sdn Bhd.

ii. The balance sum of Ringgit Malaysia Four Million (RM4,000,000.00) only shall be **paid upon the approval of the Foreign Investment Committee and any other relevant authorities** as may be necessary of the Sale & Purchase Agreement between Chase Perdana Berhad and Madrigal B Gumba described under 1(a) above. The Deposit shall be refundable in the event the approval herein are not obtained within a three months from the date hereof. (Emphasis added)

**[6]** For the purpose of this appeal, the Foreign Investment Committee will be referred to as "FIC" and "any other relevant authorities as may be necessary" includes the Ministry of Finance's ("MOF") approval as stipulated under Securities Industries Act 1983 (then in force) and the 1987 Regulations[2].

**[7]** The Sale & Purchase Agreement between the appellant and Madrigal Gumba, ("the Agreement") was executed on 26 June 1997. The contents of cl. 5 of the agreement are similar to the terms of the letter of undertaking which state as follows:

**5. Conditions Precedent**

5.1 Notwithstanding anything to the contrary contained herein the sale and purchase of the Shares is conditional upon the following conditions precedent being fulfilled:

5.1.1 The approval ("the FIC Approval") of the Foreign Investment Committee of the Prime Minister's Department, Malaysia ("the FIC") for the purchase of the Shares being obtained which approval shall be applied for by the Purchaser;

5.1.2 The approval of the Ministry of Finance for the purchase of the Shares upon the terms of this Agreement, which approval shall be applied for by the Purchaser.

**[8]** In short, the appellant agreed to pay RM5 million to the respondent for the transfer of the 240 shares to Madrigal Gumba upon the condition that the approval of MOF and FIC are obtained.

**[9]** On 28 June 1997, the appellant paid to the respondent the sum of RM1 million as the deposit mentioned in the letter of undertaking. The respondent signed an acknowledgement letter dated 28 June 1997 for the receipt of the RM1 million deposit which again included an agreement to refund the RM1 million in the event the approval by the FIC and any other relevant authorities are not obtained.

**[10]** Unfortunately, on 12 January 1998, MOF sent a letter to Jernih Karya disapproving the agreement to change the structural equity in Jernih Karya by selling its 51% equity to the appellant. The FIC also rejected the proposed change. This meant that the second condition in the letter of undertaking and Clause 5.1.1 and 5.1.2 of the Agreement has not been fulfilled.

**[11]** By not being able to secure the approvals from MOF and FIC, First Securities will not to be a holder of a dealer's licence under the then Securities Industry Act 1983 in order to carry on business as a securities broking firm. This meant that the RM5 million worth of 240 shares in Jernih Karya is worthless.

**[12]** The appellant then requested the refund of the deposit RM1 million which it had previously paid from the respondent. The respondent refused.

**[13]** An action was then brought by the appellant in the High Court at Kota Kinabalu for the recovery of RM1 million paid as a deposit for purchase of shares from the respondent. This claim was dismissed, but the respondent's counterclaim ordering the appellant to pay the remaining RM4 million as stipulated in the agreement between them was allowed. The High Court found that there was an oral agreement between the parties that varied the terms of the letter of undertaking. Dissatisfied, the appellant appealed to the Court of Appeal. The Court of Appeal used this basis when it held that the parties had agreed to waive the conditions set by the FIC and MOF to dismiss the appeal.

**[14]** Leave was granted by this court on the following three questions:

A i. Where a written agreement provides, whether as a requirement of law or policy, that approval of the Foreign Investment Committee ("FIC") and Ministry of Finance ("MOF") be obtained for the transfer of shares in a company, can one party or parties by conduct waive such
B requirement?

ii. If the answer is in the affirmative, whether such a waiver is contrary to public policy under Section 24 of the Contracts Act 1950 ("Contracts Act") in view of the prohibition of the transfer by the FIC, or the overseeing of shareholding by
C the MOF in stock broking firms under the then Securities Industries Act 1983, and whether therefore the so-called waiver is ineffective in law?

iii. Whether an alleged oral agreement, in contravention of the written agreement between the parties as evidenced by the
D Letter of Undertaking dated 24 June 1997, could have been recognized in law under section 91 and 92 of the Evidence Act 1950 ("Evidence Act") (not being a collateral contract under section 92), and allowed to form the basis of a counter claim for RM4 million which was allowed by the
E Court of Appeal?

**[15]** In fact, to make the first question of public interest and more practical, it should be worded as follows:

i. Where a written agreement provides, whether as a
F requirement of law or policy, that approval of the Foreign Investment Committee ("FIC") *made under the FIC Guidelines* and *approval of the* Ministry of Finance ("MOF") *under a legislation/statute such as the then Securities Industry Act 1983 or the present Capital Markets Services Act 2007*, be obtained for the transfer of shares in a company, can one party or parties
G by conduct waive such requirement? (emphasis added)

**[16]** Among the terms spelled out in the letter of undertaking and the agreement were the conditions that FIC and MOF's approval must be obtained. It is not denied that these two approvals were
H not obtained. The appellant rightly submitted that as long as either of the conditions was not complied with, the letter of undertaking cannot be enforced unless, as held by the Court of Appeal, these requirements can be waived.

I **[17]** Counsel for the appellant submitted that the Court of Appeal had erred in the above conclusion. It is his submission that parties to an agreement cannot waive statutory requirements. The MOF's approval is required under the Securities Industries Act 1983

(then in force) and the 1987 Regulations[3] whilst the FIC's condition is only a policy of the Government and not backed by any written law. I find that this is the correct statement of the law.

**[18]** The law on this is quite established. Once it is enacted by legislation that parties are required to comply with any provision, parties must comply with such provision. It is not for any person to waive legislative requirements by an agreement unless the legislation allows it to be done. Legislation enacts laws which in its opinion are for the benefit of the public. It is not for the courts, or anybody for that matter, to say that it need not be followed. This was clearly expressed in *Surajmull Nargoremull v. Triton Insurance Company Limited*[4] at p. 128 where Lord Sumner held as follows:

> No Court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a Court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset: *Nixon v. Albion Marine Insurance Co*[5]. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases. It is not framed solely for the protection of the revenue and to be enforced solely at the instance of the revenue officials, nor is the prohibition limited to cases for which a penalty is exigible. The expression of an agreement for sea-insurance, otherwise than in a policy, is a thing forbidden in the public interest, and the statutory insistence on a policy is no mere collateral requirement or a prescription of the proper way of making such an agreement. To allow the suit to proceed in defiance of s. 7 would defeat the provisions of the law laid down therein.

**[19]** The leading Malaysian authority regarding the fulfillment of conditions in a contract is the decision of Lord Jenkins in *Aberfoyle Plantations Ltd v. Khaw Bian Cheng*[6] where it was held by the Privy Council that parties must fulfill the conditions stipulated in the agreement. It was thus made plain beyond argument that the fulfillment of a condition precedent in a contract of sale is binding upon parties. See also *Waman Shriniwas Kini v. Ratilal Bhagwandas and Co.*[7] and *Dhanukdhari Singh & Anor v. Nathima Sahu & Ors*.[8]

**[20]** Factually also, from the terms of the letter of undertaking and subsequently in the agreement, it is without doubt that it was the intention of the parties that the requirements of the FIC's approval and that from any other relevant authorities in respect of

A the sale and purchase agreement between Madrigal Gumba and the appellant must be obtained. This was the condition precedent in the contract that must be fulfilled. This requirement is further confirmed in the letter dated 28 June 1997 enclosing the payment of the of RM1million deposit.

B

**[21]** The respondent, on the other hand, argued that the responsibility for obtaining FIC and MOF's approvals were between the appellant and Madrigal Gumba. It had nothing to do with the respondent. In my opinion, this cannot be so, because C the letter of undertaking as well as the letter dated 28 June 1997 enclosing the payment of RM1 million, clearly spelled that the respondent agreed to refund the deposit of RM1 million in the event the approval of the FIC and other relevant authorities was not obtained. It does not matter whose duty it was to obtain the D approval. The fact remains that statutory approval has not been secured. It would have been otherwise, perhaps, if the condition precedent is not one that is required by law.

**[22]** The MOF's approval in regard to licencing of securities E companies is required under s. 12 of the then Securities Industry Act 1983. In actual fact, this appeal can be disposed of by only looking into the MOF's requirement issue. In so far as the requirement of the MOF is concerned, since the approval of the MOF is required by legislation and such approval was not F obtained, the answer to the first question must be in the negative.

**[23]** Consequentially, the second question must be answered in the affirmative. That disposes of questions one and two.

**[24]** The third question is a factual question. Could the alleged G oral agreement, entered between the appellant and the respondent, which varies the terms of the Letter of Undertaking, be recognized in law under s. 91[9] and 92[10] of the Evidence Act?

**[25]** The alleged oral agreement has been accepted by the learned H High Court Judge who had the benefit of observing the demeanour of the witnesses. I find no reason to disturb his finding of the existence of an oral agreement.

**[26]** Counsel for the respondent relies on ss. 91 and 92 (b) of the Evidence Act and submitted that s. 92 of the Evidence Act is I meant to be read together with s. 91 of the Evidence Act as both provisions relate to the "best evidence rule". In essence, these two provisions require the production of the document itself for

proof of its contents. It is regarded as embodying the Common Law rule that where a contract has been reduced to writing, it is the writing that must be looked at for the entire terms made between parties subject to the six provisos embodied in s. 92(a) to (f) of the Evidence Act.

**[27]** Reading s. 92(b) of the Evidence Act in particular, it relates to an oral agreement as to any matter on which the original document is silent and which is not inconsistent with the terms. This is not the case in this instance case.

**[28]** What the respondent was supposed to have agreed to orally is in direct contradiction to the terms appearing in the letter of undertaking and the agreement and is not a term which the original document is silent. The letter of undertaking and the agreement required that the relevant authorities' approvals be obtained whilst the so called oral agreement is supposed to have waived this condition. The proviso (b) in s. 92 of the Evidence Act therefore cannot apply in this case. When the exception does not apply then the terms appearing in the letter of undertaking continue to be applicable.

**[29]** The respondent then contends that the letter of undertaking between the appellant and the respondent is independent of the sale & purchase agreement between the appellant and Madrigal Gumba. In my opinion, this cannot be so because the letter of undertaking expressly refers to the agreement by the appellant in its request that the respondent transfer all shares in Jernih Karya to Madrigal Gumba thereupon the sale & purchase agreement was executed. The letter of undertaking is therefore not independent of the sale & purchase agreement.

**[30]** I therefore answer the third question in the negative.

**[31]** This appeal is therefore allowed with costs here and the costs below. The deposit in court will be returned to the appellant.

**[32]** My learned brothers Allaudin Mohd Sheriff, PCA and James Foong Cheng Yuen, FCJ have seen this judgment in draft and expressed their agreement with it.

A **Endnotes:**

1. The Security Industry Act 1983 was later consolidated with the Futures Industry Act 1993 to become the Capital Markets Services Act 2007 on 28 September 2007.

B 2. See ss. 12, 18 and 21 of the then Security Industry Act 1983, Regulation 3 and the Second Schedule Forms under the Regulations.

3. *Supra.*

4. [1924] 52 IA 126.

C 5. [1867] LR 2 Ex. 338.

6. [1960] 26 MLJ 47.

7. AIR [1959] SC 689.

8. XI CWN 848.

D 9. **91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document.**

When the terms of a contract or of a grant or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any

E matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of the contract, grant or other disposition of property or of the matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the

F provisions hereinbefore contained.

Exception 1 – When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

G Exception 2 – Wills admitted to probate in Malaysia may be proved by the probate.

Explanation 1 – This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more

H documents than one.

Explanation 2 – Where there are more originals than one, one original only need be proved.

Explanation 3 – The statement in any document whatever of a fact, other than the facts referred to in this section, shall not preclude

I the admission of oral evidence as to the same fact.

10. **92. Exclusion of evidence of oral agreement.**

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.